90-881

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1990

KEITH DEERMAN AND FRANCIS G. KINNEY,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the repeated and unwarranted interjections and comments by the trial court created the prejudicial appearance that the defense was unworthy of belief thereby depriving the defendants of a fair trial and the effective assistance of counsel guaranteed by the Fifth and Sixth Amendments to the United States Constitution?

PARTIES

The parties to the proceeding in the court of appeals were the respondent United States and the petitioners Francis G. Kinney, Jr., and Keith Deerman.

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PETITION FOR WRIT OF CERTIORARI

Keith Deerman and Francis G. Kinney petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming their convictions for conspiracy to import and for importing marijuana and for using the telephone to implement the scheme in violation of 21 U.S.C. §§952, 963, and 843.

OPINION BELOW

The opinion of the court of appeals is unpublished and attached in Appendix A. There was no written opinion rendered by the district court.

JURISDICTION

Pursuant to 28 U.S.C. §1254(1), Deerman and

Kenney invoke the jurisdiction of the Court to review the judgment of a court of appeals in a criminal case. The court of appeals entered its judgment (App.B) affirming defendants' convictions on August 3, 1990. A petition for rehearing was timely filed and denied by the court on August 30, 1990. (App. C). This petition for certiorari is timely filed within the ninety days allowed by Rule 13.4.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Amendment V, United States Constitution:

> ". . .nor shall any person. . .be deprived of life, liberty, or property, without due pro cess of law;. . . ."

Amendment VI, United States Constitution:

> ". . .in all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Proceedings:

Petitioners, Keith Deerman and Francis G. Kinney, were charged in a seven court superseding indictment.[1] Counts 1 and 2 charged a conspiracy and attempt to import marijuana in violation of 21 U.S.C. §§952 and 963. Counts 3 and 4 of the indictment charged Kinney and Counts 5, 6,

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[1] Originally, Kinney and Deerman, along with twenty-five other individuals, were charged in a four count indictment. Counts 1 and 2 were for the same offenses recharged in the superseding indictment. Counts

and 7 charged Deerman with the use of a telephone to facilitate the conspiracy and the attempt to import the marijuana charged in Courts 1 and 2 in violation of 21 U.S.C. §843. After a jury trial, Deerman and Kinney were convicted on all counts. The court sentenced Kinney and Deerman each to serve a total of eighteen years incarceration.[2]

Facts:

Deerman and Kinney worked as special agents for the United States Customs Service. They were convicted of using their positions to provide intelligence to a drug smuggling organization. The government's key witness was co-defendant Sam Edwards, a former Customs Service agent who was the intermediary between Deerman and Kinney and the drug smugglers. Edwards had been named in four counts of the original indictment and faced a maximum penalty of fifteen years imprisonment for each charge. Prior to trial, he entered a plea of guilty to a single count of the indictment in return for helping the prosecutor.

(footnote 1 continued)
3 and 4 charged possession of and conspiracy to possess marijuana. Kinney and Deerman were acquitted of conspiracy to possess and possession (Counts 3 and 4); however, they were found guilty of conspiracy and attempt to import and distribute (Counts 1 and 2). Upon polling the jury, the guilty verdicts were less that unanimous. Kinney and Deerman moved for a new trial. The government confessed error and the court granted a new trial.

[2] Kinney was separately indicted for making false statements. 18 U.S.C. §1001. The one count false statement indictment was consolidated with controlled substances indictment for trial. The jury found Kinney guilty of making false statements and the trial court sentenced him to serve five years concurrently with the eighteen years imposed in the principal indictment. The validity of both convictions turns on the same issue.

Kinney and Deerman each testified in his own behalf. They claimed that whatever incriminating information Edwards secured from them was either secretly misappropriated by Edwards or was passed to him, either innocently or inadvertently, without any knowledge that he was involved in a conspiracy to import marijuana. Reduced to its essence, the government's case turned on its ability to persuade the jury that Samuel Edwards was a credible witness beyond a reasonable doubt. The defense was to show the contrary.

REASONS FOR GRANTING THE WRIT

The starting point for any discussion of the proper role of a federal trial judge is reflected in the words authored by Chief Justice Hughes more than a half century ago, in *Quercia v. United States*, 289 U.S. 466, 469, 53 S.Ct. 698, 699, 77 L.Ed. 1321, 1324-1325 (1933):

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purposes of assuring its proper conduct and of determining questions of law. (citation omited) In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence by drawing their attention to the part of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. (citations omitted) * * * Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal court." (citations omitted).

Thus, while it is clear that a federal judge need not sit through a trial like "a bump on a log," *United States v. Pisani*, 773 F.2d 397, 403 (2nd Cir. 1985), it is equally clear that he must maintain neutrality. An example of a trial court breaching that neutrality is found in *United States v. Cisneros*, 491 F.2d 1068, 1074 (5th Cir. 1974), where the court said:

> "Through many variations on the *Quercia* theme sound certain recurrent prohibitions. A trial judge must not appear to be a partisan for the prosecution, or in any way exhibit a prosecutor's zeal. *United States v. Musgrave*, 5 Cir. 1971, 444 F.2d 755, 761; *United States v. Marzano*, 2 Cir. 1945, 149 F.2d 923, 926. Nor may he give testimony, be a partisan witness, or add to the evidence adduced by either side. *Blunt v. United States*, 1957, 100 U.S. App.D.C. 266, 244 F.2d 355, 365. Most important, he must in no way trespass on the jury's functions and responsibilities, among the most important of which in terms of this appeal is the right to assess credibility in finding the facts. *United States v. Williams*, 5 Cir. 1971, 447 F.2d 894, 902; *United States v. Dopf*, supra, 434 F.2d (205) at 208; cf. *United States v. Stroble*, 6 Cir. 1970, 431 F.2d 1273, 1278."

As in *Cisneros*, the issue of credibility was at the forefront in the instant case. Simply put, if the jury believed Sam Edwards, they could convict; if not, they could not. Thus, this is not a case where a reviewing court can look to other evidence to establish a defendant's guilt. See: *United States v. Carpenter*, 776 F.2d 1291 (5th Cir. 1985); *United States v. Middlebrooks*, 618 F.2d 273, (5th Cir.), *cert. denied*, 449 U.S. 984, 101 S.Ct. 401, 66 L.Ed.2d 246 (1980).

In order to discredit Edwards, the defense sought to establish two propositions: first, that Samuel Edwards was by nature a person who would willingly lie when it was to his advantage to do so and, secondly, that Edwards had been given a motive to lie by the plea bargain that he entered into with the government. Counsel's efforts to establish these propositions through cross-examination of Edwards were, however, hampered by the trial judge. At every turn, the trial judge vociferously and repeatedly criticized defense counsel's questioning and methodology.[3] The trial judge so insinuated himself into the process that he devalued and belittled the cross-examination of Edwards before the jury and thereby bolstered the government's case to the defendants' extreme prejudice.[4]

As noted earlier, Edwards was allowed to enter a plea to a single count of the indictment. With regard to this apparent benefit, Edwards, a former but seasoned law enforcement official, testified that the dropping of three counts and the reduction in his possible exposure from sixty years to fifteen years was no benefit at all. "I can't really say that I got a deal. I'm sorry, I don't think I got a deal at all to be perfectly honest with you." Vol. 67, p. 157.

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[3] It is important to note that the whole issue of cross-examination — its proper execution and function — is one which has a history of causing tension between this trial court judge and Kinney's defense counsel. During the first trial of this cause, Judge Beer held counsel for Kinney in contempt of court for a cross-examination of Edwards that the Court of Appeals, reversing counsel's conviction, held to be perfectly proper. *In the Matter of Robert Glass*, No. 86-3458 (5th Cir. 1986))(unpublished).

[4] Although the majority of the trial court's improper interjections were made during the cross-examination conducted by Kinney's counsel, the prejudice to Deerman is no less manifest. Kinney and Deerman were presenting a joint defense and in the interest of efficiency and flow, co-counsel had divided the cross-examination of Edwards into specific areas for which each would be responsible. If Edwards' credibility was unfairly bolstered, then both would suffer equally.

When defense counsel, as was both his duty and his right, began to probe further and asked: "It's not as though dropping three counts of an indictment was much of a big favor to you?", the court made it clear to the jury that it did not think this line of questioning very significant:

> "Let's move on. *This jury is not really interested in all the other matters that have gone on before* except of course they must, as I will tell them when I turn the case over to them take into account whether any plea bargain that was entered into by Mr. Edwards does in any way, in their view, impair the truthfulness of his testimony."
>
> * * *
>
> "Going back in all this history and going over what Mr. Edwards thinks was or wasn't a good or fair or whatever kind of deal *is not really material.*"
>
> * * *
>
> "*I suggest that we move on to pertinent matters.* . . ." Vol. 67, pp. 161-162.

Contrary to the court's declaration, this line of questioning was extremely pertinent. Edwards' motivation to perform well for the government was at the core of the defense efforts to discredit him. It was the defense position that Edwards sacrificed the defendants in order to receive these benefits, ultimately receiving only a six year sentence that was later reduced to four years. The evidence supporting an inference of bias was substantial and crucially important, making the court's observation that counsel's questioning was neither "material" nor "pertinent," a most grievous example of judicial overreaching that telegraphed to the jury an unmistakeable and unfair message: do not take too

seriously counsel's suggestion of bias.[5]

Having been frustrated and limited in his cross-examination of Edwards on the plea bargain, defense counsel turned to Edwards' general willingness to lie. Counsel first established that Edwards was the sort of person who would lie about little things as a matter of convenience.[6] Vol. 67, pp. 168-169. He quickly moved into some of Edwards' more substantial lies, specifically the bogus psychiatric disability that he confected to receive retirement benefits from the Customs Service. Counsel had barely begun his inquiry when, although overruling the government's objection to the "pattern" of cross-examination, the court managed nonetheless to say:

> "It is cross-examination and one of the great release valves of the adversary system is to permit wide ranging cross-examination. *I'm not sure that we aren't imposing on the jury to some extent as we go into these detailed dissertations* but my view is that it is counsel's prerogative to be far reaching in his cross-examination."

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[5] This was not the court's attempt to berate counsel for "wasting" the jury's time. Just moments earlier, counsel was admonished for his use of a demonstrative aid: "What you're writing up there (counsel) is *meaningless* as far as any effect on the jury is concerned because the jury is hearing testimony and I don't propose to have it mean anything to them....Paraphrasing what he (Edwards) says in big enough letters so the jury can see it is essentially a *waste of time.*" Vol. 67, p. 152.

[6] Examining Edwards about false statements made in a simple car rental agreement, counsel asked:

> "Q. You said you were staying at the Holiday Inn and that wasn't true?
>
> * * *

Thus did the court snatch away with one hand what it had just offered with the other.[7]

A trial judge's intrusion into the jury's exclusive domain of assessing witness credibility need not be direct, as in *Quercio* and *Cisneros*, where the trial judge straight forwardly announced to the jury its belief that a witness was

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(footnote 6 continued)

A. They wanted a local address and I didn't have one at the time so I just threw out the first hotel name that came to my head. That's the only thing I can relate to that.

Q. So it was just convenient for you to misrepresent that hotel?

A. If you're asking if I lied on that, I can't say that I did or I can't say that I didn't but I did not stay at the Holiday Inn.

Q. Then you said you were employed by U.S. Customs?

A. Yes, I did. That was a lie." Vol. 67, pp.169-170.

[7] Throughout Edwards' cross-examination, the court voiced its purported solicitude for the cross-examination process in general, calling it "one of the great release valves of the adversary system" and noting that "everybody has got a right to try to put whatever questions they think are pertinent on cross-examination." Vol. 67, pp. 154, 171. It spoke, however, out of both sides of its mouth because at the same time the court praised the adversary system and claimed to permit wide ranging cross-examination, its comments directed to counsel communicated to the jury the opposite message: counsel were wasting their time, but we've all got to tolerate him because of the rules.

lying. More often than not, the offending conduct is indirect and subtle. In the instant case, the trial court became a surrogate prosecutor through a different route, attacking defense counsel and the theory of the defense. The trial court repeatedly displayed hostility toward defense counsel and went to great lengths to belittle and demean them and the defense in the jury's presence. In *Unite States v. Candelaria-Gonzalez,* 547 F.2d 291 (5th Cir. 1977), a conviction was reversed because:

> "In the trial of this case, the judge made no effort to conceal his annoyance and impatience with defense counsel's performance. He was swift to critize defense counsel in front of the jury. At times, counsel was directly ridiculed. Most of the judge's interruptions came without prompting or objection by government counsel. Granting to a trial judge considerable freedom to control a trial's progress, "he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense.' *United States v. Ah Kee Eng.*, 2 Cir. 1957, 241 F.2d 157, 161.
>
> "Even if the judge's disapproval was occasionally warranted by defense counsel's conduct, we find slight, if any, justification in the record for the judge's sarcasm, his frequent interruptions and his antagonistic comments in the jury's presence. In a case of this nature, where determination of guilt or innocence rests largely on whether the jury credits the testimony of the chief government witness or that of the defendants, avoidance

> of the appearance of bias by the trial judge takes on added importance. The conduct of the trial as a whole must be scrutinized carefully. *United States v. Grumberger,* 2 Cir. 1970, 431 F.2d 1062. Here, we view as a serious impropriety the trial judge's failure to preserve an appearance of impartiality." Id. at 297.

The same could be said of this trial judge. The trial court constantly berated counsel in the jury's presence for wasting time on matters the judge called "immaterial," "meaningless," "uninteresting," "unrelated," "unnecessary," and an "imposition."[8] These matters, however, were crucial to counsel's efforts to discredit Edwards and went to the very heart of the defense, Edwards' questionable credibility. Every time the judge belittled the importance of questions aimed at destroying Edwards as a truth teller, he told the jury that it too should view counsels' inquiries, and therefore the defense itself, as insignificant.

The foregoing demonstrates that the trial court was ever much as hostile and disparaging of defense counsel and the defense as was the case in *Candelaria-Gonzalez.*

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[8] In addition to the comments directly disparaging the defense efforts to discredit Edwards, the trial judge also commented negatively on counsel's cross-examination style. Throughout the examination, sometimes in response to a government objection, but often sua sponte, the trial judge critized counsel for interjecting "gratuitous" observations, see, e.g., Vol. 67, pp. 144, 183, 185, 240, 248, "moralistic terminology,"*Id.* at 185, and "philosophical notions." *Id. at 186. These criticisms in the jury's presence, which literally peppered Edwards' cross-examination, further prejudiced the defense.*

And *Candelaria-Gonzalez* does not stand alone. For similar judicial misconduct, convictions were reversed in *United States v. Sheldon*, 544 F.2d 213 (5th Cir. 1976); *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968), *cert. denied*, 409 U.S. 843, 93 S.Ct. 44, 34 L.Ed.2d 83 (1972); *Zebouni v. United States*, 226 F.2d 826 (5th Cir. 1955); *United States v. Mazzilli*, 848 F.2d 384 (2nd Cir. 1988); and *United States v. Hickman*, 592 F.2d 931 (6th Cir. 1979). Trial counsel, no matter how talented or experienced, cannot overcome the kind of judicial bombardment inflicted in this case and effectively represent his client. In *Bursten* the court wrote:

> "If a trial court continually intervenes so as to unnerve defense counsel and throw him off balance, in a supposedly fair trial, and causes him not to devote his best talents to the defense of his client, then this is ground for reversal, no matter what counsel's experience and equipoise may be. Even if there is a basis for some criticism of over-partisanship of defense counsel, this does not justify unwonted and unnecessary continuous interruptions. (footnote omitted) A trial judge must strive for total neutrality and complete circumspection, in the eyes and minds of the jury." *United States v. Bursten, supra.*

While reviewing cases such as this, a court must look to the entire record, *United States v. Carpenter*, 776 F.2d 1291 (5th Cir. 1985), but must remain sensitive to the fact that the transcript does not easily capture the true import of the trial judge's conduct. This problem was recognized in *United States v. Williams*, 809 F.2d 1072, 1086 (5th Cir. 1987), where the court said:

> "In reviewing these claims, we are necessarily limited to the cold black and white of the transcripts. The life of the trial, in which gestures and intonations breathe more subtle meanings

> into the transcribed words, cannot be presented and escapes us. We must therefore scrutinize the record all the more carefully."

A court should not affirm a conviction on a record that demonstrates the kind of significant judicial overreaching present here unless it is ". . .convinced that the intervention could not reasonably have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor." *United States v. Gomez-Rojas,* 507 F.2d 1213, 1223-1224 (5th Cit. 1975), *cert. denied,* 423 U.S. 826, 96 S.Ct.41, 46 L.Ed.2d 42. In making this determination, a number of factors have been considered historically. The judicial misconduct must first be substantially prejudicial. *United States v. Carpenter, supra; United States v. Adkins,* 741 F.2d 744 (5th Cir. 1984), *cert. denied,* 471 U.S. 1053, 105 S.Ct. 2113, 85 L.Ed.2d 478 (1985). In assessing prejudice, courts have looked for the presence of independent evidence that would furnish a basis for the defendant's guilt. *United States v. Carpenter, supra; United States v. Middlebrooks, supra.* However, in cases such as this one, where the defendant's guilt hinges on the credibility of a single government witness, a court should have little difficulty in finding substantial prejudice. *United States v. Candelaria-Gonzalez, supra; United States v. Sheldon, supra; United States v. Cisneros, supra; Bursten v. United States, supra.*

Reviewing courts have also considered the effect of any curative instructions given by the trial judge to the jury. *United States v. Williams supra; United States v. Carpenter, supra; United States v. Adkins, supra; Moore v. United States,* 598 F.2d 439 (5th Cir. 1979). In the case at

bar, the trial judge did give a curative instruction.[9] The court instructed the jury that its rulings were intended to be impersonal and if it sensed something otherwise, it was unintentional and should be disregarded. The court assured the jury that it did not in any way intend to demean the contentions of defense counsel. Vol. 67, pp. 172-174. Having said all that, the court then proceeded to undo whatever good its instruction might have done. Counsel picked up where he had left off, exposing the pension that Edwards had secured through falsehoods about his mental status. Counsel began to develop the fact that Edwards was still receiving the benefits even though the government had known since he began cooperating four years earlier that he was not entitled to it. Counsel hadn't gotten very far when the court interrupted him:

> "Look, counsel. You have developed that he has the pension and that he is still getting it. Let's not have another repartee in spite of that you're still getting the pension that is what I mean by taking up more time than is fair in the circumstances. Let's move along to the next point." Vol. 67, p. 178.

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[9] The full instruction given by the court is as follows:

"Let me say to the jury, my ruling with respect to these matters are intended to be completely impersonal. If the jury senses othewise, then they are sensing something that is unintentional and should be disregarded. It is my purpose to try to preside over this matter as fairly and evenhandedly as I expect you to ultimately consider the case and decide it. Whenever there is a vigorous contention on the part of one attorney and on both of the other attorneys, the Court's concern sometimes is directed towards what is material as far as the jury is concerned. My concern is to try to direct the flow of evidence in such a way as to let the jury hear every bit of information that could be material to the fair and evenhanded determination of the case, taking into consideration the concern with time. We have to take concern with time.

The immediate undercutting of the instruction to one side, it is clear that such an instruction does not automatically end the inquiry in any case. The courts have repeatedly recognized that:

> "It is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the trial judge, the trial arbiter, and that some comments may be so highly prejudicial that even a strong admonition by the judge to the jury, that they are not bound by the judge's views, will not cure the error. (footnote omitted)." *Bursten v. United States, supra,* at 983).

(footnote 9 continued)

Every case has to move along at some rate of speed. If my concern seems to be in any direction other than that, of trying to keep the matter moving along, you should ignore it because my rulings are intended to be, in every respect, impartial and based on what I perceive to be an impartial role that the Judge has to play in the trial of any case. On the other hand, I have the obligation to the record, to you, to the administration of justice, to try to keep it moving. Occasionally I may inadvertently refer to that commitment that I feel strongly about, which may, as counsel respectfully points out, appear to demean the contentions that he is making. That is not the case. I tell you now and would at any given time reiterate, that my intention is to conduct the trial in such a way as to have you all make a fair and well based determination and yet, still keep it moving within the bounds of some reasonableness. My concern is to keep the matter moving along without antagonisms which are understandable in any hard fought matter. My concern is not directed at any event toward the correctness and incorrectness or truthfulness or lack of truthfulness of any or these contentions. It is up to you all to decide that. That is your job and that is your responsibility which I don't intend to diminish or take away from you one bit. Mine is to try to keep it moving and sometimes the notion that we have to do that out of fairness to all concerned may unfortunately override some of these other considerations, at least to some extent. You shouldn't be influenced in any way by anything that I say in terms of making your own determinations about the truthfulness or what the facts are. There are times when I have to reserve the right as the arbitrator of the progress of the trial to try to hurry it along without letting that unfairly or unduly affect anybody's side of the case. Let's proceed." Vol. 67, pp. 172-174

Again, in *United States v. Hoker*, 483 F.2d 359 (5th Cir. 1973) at 368, the court said:

> "The position of a trial judge carries such overpowering weight before a jury that we can not be certain that the verdict was that of the jury uninfluenced by a desire to bring in a verdict calculated to please the judge. No amount of boiler plate instructions to the jury - not to draw any inferences as to the judge's feelings about the facts from his asking questions, or that they are free to disregard factual comment by the judge, or as to the presumption of innocence - could be expected to erase from a jury's mind the part taken in this trial by the district judge. (footnote omitted)."

See also: *United States v. Williams, supra; United States v. Cisneros, supra.*

Another factor traditionally considered by courts is the number of times that the trial judge interjects himself into the proceedings. "A statistical count of court interruptions is pertinent to the inquiry." *United States v. Williams, supra* at 1087; *United States v. Sheldon, supra; United States v. Lanham*, 416 F.2d 1140 (5th Cir. 1969). In the instant matter, the trial court interjected himself no less than seven times during the cross-examination of Edwards to demean directly the importance of the defense. See Vol. 67, pp. 152, 161-162, 171, 178, 240, 269. He interrupted on numerous additional occasions to criticize counsel's cross-examination style in general. The statistical count of judicial jibes and low blows was indeed weighty, however, and the Court should keep in mind that "the tenor of the court's questions rather than their bare number is the more important factor." *United States v. Hoker, supra* at 366. For example, Edwards was asked

about a letter, replete with lies, that he had written upon his resignation from the Customs Service. Counsel sought to reveal each falsehood before the jury. Although the court permitted this line of questioning, it did so grudgingly and with a prelude that could only have told the jury to disregard the evidence as unimportant. Said the court:

> "We have been through the letter in the sense of the witness' observations already about the fact that it is untruthful in various references throughout. *To take the jury through each individual instance of that is not, in my opinion, necessary* on the basis of the statement that the witness has already made." *Id.* at 240.

The importance to the defense counsel of revealing Sam Edwards' lies in detail cannot be overemphasized. Edwards' history revealed him to be an artful, accomplished liar, able to fool experienced adverse examiners. Exposing Edwards' past record for successful storytelling could have readily convinced the jurors that he was at it again, manipulating the government, manipulating the defendant, and manipulating them. To tell the jury that such evidence is "not necessary" to its decision is to take from it its essential truth finding function.

Co-counsel's examination of Edwards fared little better. While questioning the witness about numerous falsehoods set forth in a financial statement for a loan, counsel was admonished:

> "I think the whole thing is so immaterial as to be simply an *imposition on the jury* with respect to the place that we have finally gotten in the interrogation of this witness with respect to activities that are so *totally unrelated as to be, as far as I'm concerned, immaterial*. . . ." *Id.* at 269.

Influenced by the judge's improper commentary, the jury could not help but feel the same.

Finally, the courts have considered whether defense counsel objected to the trial judge's misconduct, *United States v. Carpenter, supra; Moore v. United States, supra,* and whether the jury's acquittal on some counts reflected that it was unaffected by the judge's misconduct. *United States v. Abrams,* 568 F.2d 411 (5th Cir. 1978), *cert. denied,* 437 U.S. 903, 98 S.Ct. 3089, 57 L.Ed.2d 1133. In this case, the latter factor is not present. As to the former, defense counsel objected most strenuously to the court's running commentary.[10] See Vol. 67, p.171; Vol. 1, p. 77.

When the judge's repeated and unwarranted interjections in this case are viewed in the context of the entire

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[10] At one point, counsel tactfully objected at the bench:

> "Judge, I'm not suggesting it's intentionally done, but when you tell the jury that a part of my cross-examination is useless or wearing on them or more than they want to hear, I think it signals to them a wrong signal that they should devalue it. I haven't objected before but I want to bring it to your attention. I don't think it is being done personnally against me."

After Edwards' testimony had concluded, Kinney's counsel moved for a mistrial and Deerman's counsel joined. Counsel explained the grounds for his request:

> "(T)here were comments made in front of the jury which I believe, on reflection, cumulatively told the jury that the cross-examination of Mr. Edwards on the plea bargain and other credibility matters were not to be taken too seriously, that it was to be discounted, that there were other more important things than that

record, and especially when considered in light of the fact that the credibility issue before the jury was close, difficult, and extremely important, there is no doubt that the trial court's conduct tipped the scale in favor of conviction. In so doing, the trial judge lost sight of the fact that:

> "The judge's role is not that of catalyst for a guilty verdict. He sits, not to lead the jury down a direct road to a particular verdict, but to offer guidance along the sometimes meandering road to the truth. He is neither an imperator nor a jury surrogate." *United State v. Cisneros, supra* at 1078.

(footnote 10 continued)

> and that in total, therefore, the jury could well believe that the examination for credibility of Mr. Edwards is not to be considered by them in evaluating their judgment of the case. Most importantly, from our point of view, Mr. Edwards is a linchpin witness, his credibility is the be all and end all of the case and, therefore, I would respectfully move for a mistrial." Vol. 59, p. 77.

The court denied the motion. *Id.*

CONCLUSION

As a result of the trial judge's repeated and unwarranted interjections during the cross-examination of the government's single most important witness, the Petitioners, Keith Deerman and Francis G. Kinney, were denied their rights to a fair trial, due process, and the effective assistance of counsel. Their convictions should be reversed and their cases remanded for a new trial free from the judicial overreaching that occurred in the trial court.

Respectfully submitted:

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ARTHUR A. LEMANN III

CERTIFICATE OF SERVICE

This is to certify that copies of the Petition for Writ of Certiorari have been served upon the United States of American by placing three copies thereof in the United States Mail, postage prepaid, addressed to the Honorable Kenneth W. Starr, Solicitor General, Department of Justice, Main Justice Building, Room 5143, Washington, D.C. 20530; and by placing three copies thereof in the United States Mail, postage prepaid, adressed to the Honorable John Volz, United States Attorney for the Eastern District of Louisiana, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130.

New Orleans, Louisiana, this 27th day of November, 1990.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3456
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANCIS C. KINNEY, Jr., and
KEITH DEERMAN,
Defendants-Appellants.

Appeals from the United States District Court for the
Eastern District of Louisiana
(CR-85-321-"M" (4) c/w CR-87-72-"M")

(August 3, 1990)

Before CLARK, Chief Judge, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

I.

Francis Kinney and Keith Deerman appeal their convictions for conspiracy to import and for importing into the United States over 50,000 pounds of marijuana and for using the telephone to implement the importation scheme. Kinney also appeals his conviction of making a false statement to United States Custom Service Officials. We affirm.

II.

Kinney and Deerman ("the defendants") worked for the United States Customs Service in New Orleans. In 1984 they became involved with a plan to import marijuana from Columbis into the United States by ship through the port of New Orleans. The defendants attempted to use their Customs Service connections to ensure undetected passage for the contraband. The Federal Bureau of Investigations and the Drug Enforcement Agency received information about the operation, however, and arrested Kinney, Deerman, and several co-defendants during the transportation of the marijuana.

At trial, the government's key witness was co-defendant Sam Edwards, a former Customs Service agent who had also been involved in the importation scheme. Edwards provided vital testimony of the part played by Kinney and Deerman in the attempted importation. Most of

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Edwards' testimony was corroborated by physical evidence or by the evidence of other witnesses.

The defendants allege that during their cross-examination of Edwards, the trial judge interrupted the examination so often and in such a manner as to implicitly persuade the jury to disregard the defendants' efforts to impeach Edwards' credibility. The defendants cite seven statements or groups of statements made by the judge within 175 transcript pages of testimony by Edwards which, they argue, denied their right to a fair trial, to due process, and to effective assistance of counsel.

The government responds that most of the statements made by the trial judge were not made sua sponte, but were in response to objections posed by the prosecutioin. Most of these prosecution objections were overruled, and at no point was the defense disallowed its opportunity to present relevant impeachment evidence.

III.

The statement made by the trial judge, when read in context, show no disparagement of the defense counsel's tactics, intelligence, or evidence. The statements do not comment at all, much less unfairly, on the veracity of the evidence. Rather, the comments direct defense counsel to avoid repetitious questions and questions on subjects which were irrelevant or immaterial to the trial. For instance, when questioning Edwards about a letter written by him to the Customs Service which contained several false statement, defense counsel proceeded to read each sentence to the witness, asking whether the statement was true or false. The letter was five pages long, and many of the statements had no relevance to the defendant's case. Since Edwards had already admitted that the letter was

"full of lies," the trial judge instructed defense counsel as follows:

> We have been through the letter in the sense of the witness' observations already about the fact that it is untruthful in various references throughout. To take the jury through each individual instance of that is not, in my opinion, necessary on the basis of the statement that the witness has already made. On the other hand, it seems to me that full cross examination should let you have an opportunity to demonstrate your contentions which have already been acknowledged as correct by the witness in some degree or to some extent, so the jury can have the opportunity to weigh that as they make their own determinations about the truthfulness of this witness' testimony as it has to do with the matters that we are addressing here in this trial. I don't intend that to be license to the point of permitting you, Mr. Glass [defense counsel], to go incident by incident. Use a certain amount of discretion in highlighting those that you want to make a point of and then let's move on. Let's proceed on that basis.

This comment is representative of those condemned by the defendants. We agree with the government, however, that such a comment is well within the trial judge's discretion in ordering the presentation of evidence at trial. A federal trial judge may

> 'comment on the evidence, may question witnesses and elicit facts not yet adduced or clarify those previously presented, and may maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretiion. Only

> when the judge's conduct strays from neutrality is the defendant thereby denied a constitutionally fair trial.

Moore v. United States, 598 F.2d 439, 442 (5th Cir. 1979) (citations omitted). See Federal Rule of Evidence 403 (relevant evidence may be excluded to avoid "undue delay, waste of time, or needless presentation of cumulative evidence.")

The trial judge's remarks here were not disparaging to the defense; neither did they restrict the defense from presenting important evidence. The court merely directed defense counsel to use discretion in limiting his presentation of evidence to that which would be useful to the jury. On only one occasion noted by the defendants did the judge stop defense counsel from further questioning Edwards on a matter. We agree with the trial judge that this issue, the price of an airline ticket purchased for Edwards by a Norwegian company that had interviewed Edwards for a job, was irrelevant. Because the judge's actions at no time strayed from neutrality," and because "we are convinced that the intervention could not have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor,;; *United States v. Gomez-Rojas*, 507 F.2d 1213, 1223, 24 (5th Cir.), *cert. denied*, 423 U.S. 826 (1975), we affirm.

IV.

The Judgment of the district court is

AFFIRMED.

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ M. Thompson
Deputy
New Orleans, Louisiana
Sep 10 1990

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3456
Summary Calendar

Filed AUG 3 1990

D.C. Docket No.CR-85-321-"M"(4) c/w CR-87-72-"M"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KEITH DEERMAN,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

Before CLARK, Chief Judge, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this casue is affirmed.

August 3, 1990

ISSUED AS MANDATE:
SEP 10 1990

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3456
Summary Calendar

Filed Aug 30 1990

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANCIS C. KINNEY, Jr., and
KEITH DEERMAN,
Defendants-Appellants.

. . . . . .

Appeals from the United States District Court for the
Eastern District of Louisiana

. . . . . .

ON PETITION FOR REHEARING
(August 30, 1990)

Before CLARK, Chief Judge, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered casue be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ illegible
CHIEF JUDGE